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Federal Communications Commission

FCC 97-414

DEC 20 9 16 AM '97

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
 )  
Fees for Ancillary or Supplementary ) MM Docket No. 97-247  
Use of Digital Television Spectrum )  
Pursuant to Section 336(e)(1) )  
of the Telecommunications Act of 1996 )  
 )

## NOTICE OF PROPOSED RULE MAKING

**Adopted:** December 18, 1997

**Released:** December 19, 1997

**Comment Date:** March 3, 1998

**Reply Comment Date:** April 2, 1998

By the Commission: Commissioner Ness issuing a statement.

### I. INTRODUCTION

1. Earlier this year we adopted rules implementing a transition to digital television ("DTV") for all existing television broadcasters.<sup>1</sup> In accordance with the Telecommunications Act of 1996 ("1996 Act"),<sup>2</sup> we established standards for license eligibility, a transition and construction schedule, and a requirement that broadcasters continue to provide one free, over-the-air television service. As required by the 1996 Act, we adopted rules permitting DTV licensees to use this spectrum to provide ancillary or supplementary services, provided such services do not derogate the free television service. The 1996 Act further requires the Commission to assess and collect a fee for the ancillary or supplementary use of the spectrum when the licensee receives for these services either subscription fees or other compensation from third parties. With this *Notice of Proposed Rule Making*, we identify various programs by which such fees may be assessed.

<sup>1</sup> *Fifth Report and Order* in MM Docket No. 87-268, In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, 12 FCC Rcd. 12806 (1997) ("*Fifth Report and Order*").

<sup>2</sup> Pub. L. No. 104-104, 110 Stat. 56 § 201 (1996), codified at 47 U.S.C. § 336.

## II. BACKGROUND

2. The 1996 Act set up the framework for licensing DTV spectrum to existing broadcasters<sup>3</sup> and the *Fifth Report and Order* established rules by which those licenses are assigned and adopted regulations regarding DTV licensees' provision of ancillary or supplementary services. Specifically, Congress directed the Commission to require that the broadcast of any ancillary or supplementary services on frequencies designated for advanced television services: (1) must be consistent with the advanced television technology designated by the Commission (the DTV Standard); (2) must not derogate any advanced television services (including HDTV) that the Commission may require; and (3) may be subject to Commission regulations applicable to analogous services.<sup>4</sup> Moreover, Congress directed the Commission to establish a fee program for any ancillary or supplementary services for which a licensee receives any compensation other than commercial advertisements used to support non-subscription broadcasting.<sup>5</sup>

3. In the *Fourth Report and Order* we adopted a technical standard that supports the transmission of High Definition Television ("HDTV") as well as the transmission of multiple programs of standard definition television ("SDTV") and non-video services.<sup>6</sup> This

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<sup>3</sup> 47 U.S.C. § 336(a) COMMISSION ACTION.--- If the Commission determines to issue additional licenses for advanced television services, the Commission --

(1) should limit the initial eligibility for such licenses to persons that as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both); and

(2) shall adopt regulations that allow the holders of such licenses to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity.

(b) CONTENTS OF REGULATIONS. -- In prescribing the regulations required by subsection (a), the Commission shall --

(1) only permit such licensee or permittee to offer ancillary or supplementary services if the use of a designated frequency for such services is consistent with the technology or method designated by the Commission for the provision of advanced television services;

(2) limit the broadcasting of ancillary or supplementary services on designated frequencies so as to avoid derogation of any advanced television services, including high definition television broadcasts, that the Commission may require using such frequencies;

(3) apply to any other ancillary or supplementary service such of the Commission's regulations as are applicable to the offering of analogous services by any other person, except that no ancillary or supplementary service shall have any rights to carriage under section 614 or 615 or be deemed a multichannel video programming distributor for purposes of section 628;

(4) adopt such technical and other requirements as may be necessary or appropriate to assure the quality of the signal used to provide advanced television services, and may adopt regulations that stipulate the minimum number of hours per day that such signal must be transmitted; and

(5) prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity.

<sup>4</sup> 47 U.S.C. § 336(b)(1). See also H.R. Conf. Rep. No. 458, 104th Cong., 2nd Sess. 160 (1996).

<sup>5</sup> 47 U.S.C. § 336(e). See also H.R. Conf. Rep. No. 458, 104th Cong., 2nd Sess. 160 (1996)

<sup>6</sup> *Fourth Report and Order* in MM Docket No. 87-268, 11 FCC Rcd 17771, ¶ 5 (1996) ("*Fourth Report and Order*").

standard permits the provision of other services including the transmission of CD quality audio signals or large amounts of data. For example, a DTV licensee will be able to transmit "telephone directories, stock market updates,...computer software distribution, interactive education materials or virtually any other type of information."<sup>7</sup> The DTV standard "allows broadcasters to send video, voice and data simultaneously and to provide a range of services dynamically, switching easily and quickly from one type of service to another."<sup>8</sup>

4. In the *Fifth Report and Order* we established rules whereby broadcasters may use their DTV capacity to provide ancillary and supplementary services which "do not interfere with the required free service."<sup>9</sup> We stated that the DTV licensees' ability to provide ancillary or supplementary services will "allow the broadcasters flexibility to respond to the demands of their audience" for such services.<sup>10</sup> We also "recognize[d] the benefit of permitting broadcasters the opportunity to develop additional revenue streams from innovative digital services."<sup>11</sup>

5. The 1996 Act required DTV licensees receiving fees or certain other compensation for ancillary or supplementary services provided on the DTV spectrum to return a portion of that revenue to the public.<sup>12</sup> The Commission was charged with establishing a

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* Equipment designed to our technical standard requires an entire 6 MHz VHF or UHF broadcast channel for all modes of operation. The standard also defines a digital bitstream carried within the 6 MHz channel. This bitstream has a usable payload capacity of nearly twenty million bits per second (20 Mbps). It is this nearly 20 Mbps payload bitstream, rather than the 6 MHz spectrum channel, that is subdivided to provide a flexible array of services.

<sup>9</sup> *Fifth Report and Order* at ¶ 29.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> 47 U.S.C. § 336(e) FEES

(1) SERVICES TO WHICH FEES APPLY -- If the regulations prescribed pursuant to subsection (a) permit a licensee to offer ancillary or supplementary services on a designated frequency --

(A) for which the payment of a subscription fee is required in order to receive such services, or

(B) for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required),

the Commission shall establish a program to assess and collect from the licensee for such designated frequency an annual fee or other schedule or method of payment that promotes the objectives described in subparagraphs (A) and (B) of paragraph (2).

(2) COLLECTION OF FEES.-- The program required by paragraph (1) shall--

(A) be designed (i) to recover for the public a portion of the value of the public spectrum resource made available for such commercial use, and (ii) to avoid unjust enrichment through the method employed to permit such uses of that resource;

(B) recover for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed pursuant to the

means of assessing and collecting fees for those ancillary or supplementary services specified in the statute.<sup>13</sup> As a shorthand, we will refer to such services as "feeable ancillary or supplementary services." These services are described more fully in Paragraph 8 below.

6. To implement this provision of the 1996 Act, we seek comment on various methods of assessing a fee. We set forth possible fee assessment programs, including a fee related to the amount that would have been realized at auction, a fee based upon net revenues or incremental profits received from the provision of feeable ancillary or supplementary services, a fee assessed as a percentage of gross revenues, and a fee based upon a hybrid of a flat rate and a percentage of revenues. We invite public comment on the issues and goals underlying these different fee assessment programs.

### III. DISCUSSION

#### Goals and General Criteria for Assessing Fees

7. The 1996 Act first directs that any fee we establish should "recover for the public a portion of the value of the public spectrum" made available for ancillary or supplementary use by DTV licensees.<sup>14</sup> This requirement echoes the competitive bidding provisions of the Communications Act of 1934 ("Communications Act").<sup>15</sup> Second, the 1996 Act requires that the fee be designed "to avoid unjust enrichment" of broadcast licensees by their use of the spectrum for ancillary or supplementary services for which they collect fees

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provisions of section 309(j) of this Act and the Commission's regulations thereunder; and (C) be adjusted by the Commission from time to time in order to continue to comply with the requirements of this paragraph.

(3) TREATMENT OF REVENUES. --

(A) GENERAL RULE. -- Except as provided in subparagraph (B), all proceeds obtained pursuant to the regulations required by this subsection shall be deposited in the Treasury in accordance with chapter 33 of title 31, United States Code.

(B) RETENTION OF REVENUES. -- Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this section and regulating and supervising advanced television services. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account and shall be deposited in such accounts on a quarterly basis.

(4) REPORT.-- Within 5 years after the date of enactment of the Telecommunications Act of 1996, the Commission shall report to the Congress on the implementation of the program required by this subsection, and shall annually thereafter advise the Congress on the amounts collected pursuant to such program.

<sup>13</sup> *Id.* at § 336(e)(1)(A)-(B). *See also* H.R. Conf. Rep. No. 458, 104th Cong., 2nd Sess. 160 (1996) ("Subsection (d) requires the Commission to establish a fee program for any ancillary or supplementary services if subscription fees or any other compensation fees apart from commercial advertisements are required in order to receive such services").

<sup>14</sup> *Id.* at § 336(e)(2)(A)(i).

<sup>15</sup> *Id.* at § 309(j)(3)(C).

or certain other compensation.<sup>16</sup> DTV licensees could be placed at an unfair advantage if they paid no fee when using their DTV capacity to provide certain ancillary or supplementary services, given that nonbroadcast licensees providing analogous services may have acquired their spectrum through an auction process. Third, the 1996 Act requires that the fee recover "for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered" in an auction.<sup>17</sup>

8. Section 336 (e)(1) of the 1996 Act requires a fee to be assessed upon any services "for which the payment of a subscription fee is required in order to receive such services" or "for which the licensee directly or indirectly receives compensation from a third party in return for transmitting materials furnished by such third party." The Act specifically exempts from the fee any service which relies upon "commercial advertisements used to support broadcasting for which a subscription fee is not required."<sup>18</sup> Further, the Conference Report states that the Commission must "establish a fee program for any ancillary or supplementary services if subscription fees or any other compensation apart from commercial advertisements are required in order to receive such services."<sup>19</sup> Thus, a fee must be assessed on any ancillary or supplementary services that are not supported entirely by commercial advertisements (hereinafter referred to as "feeable ancillary or supplementary services"). We recognize, of course, that feeable ancillary or supplementary services may be offered simultaneously with other services, including HDTV, SDTV, or other video programming supported entirely by commercial advertisements, or other non-feeable ancillary or supplementary services. The mere fact that a feeable ancillary or supplementary service is being transmitted does not mean that all simultaneously transmitted ancillary or supplementary services are feeable. We invite comment on these issues.

9. In establishing a fee for the feeable ancillary or supplementary use of DTV capacity, we are cognizant of the administrative burden which such a fee could entail. In order to minimize this burden both for broadcasters and for the Commission, the fee should be simple to understand and be calculable with readily available information. An overly complex fee program could be difficult to calculate and enforce and could create uncertainty that might undermine a DTV licensee's business planning.

10. We intend to establish a fee program consistent with the criteria set forth in the 1996 Act. The 1996 Act evidences the intent of Congress that broadcasters be allowed the flexibility to provide such services. In implementing the statutorily mandated fee program, it is not our intention to dissuade broadcasters from using the DTV capacity to provide feeable ancillary or supplementary services.

11. We recognize that there may be some tension among our goals. The means of assessing the fee may affect whether ancillary or supplementary services are offered at all and which services are offered. A fee set too high would serve as a disincentive for

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<sup>16</sup> *Id.* at § 336(e)(2)(A)(ii).

<sup>17</sup> *Id.* at § 336(e)(2)(B).

<sup>18</sup> *Id.* at § 336(e)(1)(B).

<sup>19</sup> H.R. Conf. Rep. No. 458, 104th Cong., 2nd Sess. 160 (1996).

broadcasters to provide feeable ancillary or supplementary services. It could reduce the benefits that consumers receive from services provided on the DTV capacity. On the other hand, a fee that is set too low might not prevent the unjust enrichment of DTV licensees as required by the 1996 Act and might not recover an amount approximating the amount that would have been recovered at auction, although it could recover for the public a "portion of the value" of the spectrum. We ask commenters to address how the proposals and options set forth below strike the appropriate balance among the goals we have outlined.

#### **Proposals for Establishing Fees for Feeable Ancillary or Supplementary Services**

12. Among the fee options consistent with the guidelines of the 1996 Act are first, a fee akin to the amount that would have been received in an auction of the spectrum; second, a fee based upon the net revenues or incremental profits from the ancillary or supplementary use of a licensee's DTV capacity; third, a fee assessed as a percentage of the gross revenues received for the ancillary or supplementary use of this capacity; and fourth, a fee based upon a hybrid of a flat rate and a percentage of revenues.

13. Revenue-based fees can affect the mix of ancillary or supplementary services provided, and also raise issues of accounting, auditing, and cost allocation. The choice of a fee structure may affect the choices made by consumers of feeable ancillary and supplementary services. A fee based on gross revenues does not require any cost allocation, but does require auditing of revenues to ensure that licensees do not attribute revenues from feeable ancillary or supplementary services to non-feeable services in order to reduce their fee liability. Because a fee based upon gross revenues ignores variations in the cost of providing different feeable ancillary or supplementary services, it will affect consumer choices among feeable ancillary or supplementary services. The magnitude of this effect depends on how much variation there is in the unit cost of different feeable ancillary or supplementary services. If the costs are quite similar, the effects will be minor. Notwithstanding any differences in cost, a smaller fee on gross revenues will reduce the impact on consumer choice. A variant on the gross revenue fee is a hybrid fee, consisting of a flat fee combined with a percentage of gross revenues. This structure would not further affect consumers' choices among feeable ancillary or supplementary services and would place a fixed floor under the amount recovered in return for use of the public spectrum. A fee based on net revenues or incremental profits presents additional accounting challenges, because it requires assigning costs to each feeable ancillary or supplementary service. Apportioning common costs among services may be quite difficult, but determining service-specific incremental costs could be less difficult. A fee based on net revenues or incremental profits could make consumers' choices among feeable ancillary or supplementary services more efficient.

14. In the paragraphs below, we describe each of these options, and explain our inclination to favor a formula that incorporates gross revenues as an element. We seek comment on the appropriateness and feasibility of each option.

15. *Auction-Related Fee.* The statute requires that the fee "to the extent feasible" equal but not exceed, over the term of the license, the amount that would have been realized at auction. There are significant obstacles, however, to basing the fee directly on such a spectrum-auction model. Were it possible to construct, an auction model would provide some guidance in valuing the DTV spectrum. However, spectrum auctions that have been held to date, such as those conducted for licenses to provide personal communications services, took place in circumstances so different from those in which a fee is to be assessed for the

ancillary or supplementary use of DTV capacity that they are not necessarily applicable. Depending upon a variety of technological and regulatory factors including what services are authorized, auctioned spectrum may be usable either for more or fewer kinds of services than those authorized on the DTV spectrum. Moreover, the process of assessing a fee for feeable ancillary or supplementary use of DTV capacity involves setting a fee for the use of the assigned spectrum for any number of services at different times. The relative market demand among services may change month-to-month, day-to-day, or hour-by-hour. In addition, different types of services may require different amounts of capacity. For example, at any given instant HDTV may require the entire 20 Mbps payload capacity while standard definition television programming requires far less capacity. Moreover, a licensee providing free, advertiser-supported programming on its DTV channel, whether in the form of HDTV or multiple SDTV streams, is exempt from the statute's fee requirement. Thus, it is difficult to identify market transactions that involve the transfer of spectrum usage rights equivalent to that capacity which DTV licensees may use to provide feeable ancillary or supplementary services. A fee directly tied to the auction-model estimate of the value of the capacity used for particular feeable ancillary or supplementary services would necessarily be a moving target, would involve innumerable unknown variables, and would be difficult if not impossible to assess.

16. Given these problems, we are initially disinclined to base the fees on a model that would seek to simulate the revenue that would be generated from an auction. The language of the 1996 Act gives us flexibility in this regard, stating that we should use the auction value "to the extent feasible." We invite comment on our interpretation of the Act and on the feasibility of setting fees based directly on an auction model.

17. *Relationship Between the Value of the DTV Spectrum and Revenues.* We believe that we can construct a fee program that satisfies the statutory directive through the imposition of a fee based upon revenues received from the feeable ancillary or supplementary use of the DTV capacity. The relationship between the value of the DTV capacity used in the provision of feeable ancillary or supplementary services and the revenue produced from the provision of those services can be demonstrated using microeconomic theory. It may, therefore, be possible to establish a fee program as required by the 1996 Act based upon some measure of revenues received from these services.

18. More specifically, where DTV capacity is viewed in economic terms as an input of production used to produce a given ancillary or supplementary service, and the capacity can be combined with other inputs of production, such as equipment, programming, and labor in variable proportions to produce the service, it is possible to postulate a relationship between variable quantities of DTV capacity and the quantity of the service actually produced, holding constant all other inputs of production.<sup>20</sup> Whatever the nature of the actual empirical input-output relationship, it will reflect the economic principle of diminishing returns to DTV capacity as a variable input of production, if the other inputs of production are held constant. In other words, all other things remaining the same, an increase in the quantity of digital capacity used to produce a given feeable ancillary or supplementary service will result in the production of increasing quantities of the ancillary or supplementary

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<sup>20</sup> The input-output relationship between the quantity of DTV spectrum and the quantity of feeable ancillary or supplementary services produced may be approximated using engineering or technical relationships or econometric methods.

service although the rate of increase will diminish as the increasing quantity of capacity is forced to work with fixed quantities of all other inputs of production. The relationship between the quantity of DTV capacity used in production and the diminishing rate of increase in total output is called, in graphical terms, a marginal product curve.

19. Microeconomic theory demonstrates that the marginal product curve represents a firm's demand curve for a single variable input of production, or, here, a broadcaster's demand for digital capacity for producing feeable ancillary or supplementary services. Theory also shows that a profit-maximizing firm will use an amount of the variable input of production (DTV capacity) that equates the marginal product (or incremental change in total output produced resulting from an incremental change in the amount of DTV capacity used in production) of the variable input or DTV capacity, multiplied by the unit market price of the specific ancillary or supplementary service, with the unit price of the input (DTV capacity) itself. In the case of DTV capacity as a variable input of production, there is no market-determined price established by auction which can be equated with the value of marginal product ("VMP"), i.e., marginal product multiplied by the unit market price of a specific ancillary or supplementary service. Within the range of efficient production described by the empirical input-output relationship, the value of marginal product curve represents the *implicit* value to the broadcaster of DTV capacity used to produce feeable ancillary or supplementary services.<sup>21</sup> Moreover, it can be shown that VMP may be interpreted as a measure of incremental revenue attributable to a one unit increase in the quantity of DTV capacity used to produce a given ancillary or supplementary service. Multiplying the implicit unit value of DTV capacity by the corresponding quantity of capacity actually used in providing a given service provides an estimate of the implicit market value of that particular quantity of capacity for that particular broadcaster providing that specific service.<sup>22</sup> The ratio of this implicit value of DTV capacity to some measure of revenues generated by the sale of the specific feeable ancillary or supplementary service provides a conceptual basis for relating the value of the capacity to service revenues.

20. This conceptual approach can only approximate the implicit value of DTV spectrum over a range of possible quantities of the DTV capacity actually used to produce specific ancillary or supplementary services, since market-determined unit prices of DTV spectrum are unavailable. We believe, however, that the VMP curve provides some evidence of the implicit value of DTV capacity used to provide each specific feeable ancillary or supplementary service and, therefore, provides a conceptual basis for estimating the market value of such spectrum within the range of efficient production of feeable ancillary or supplementary services. We seek comment the conceptual framework outlined here.

21. *Fee Based Upon Net Revenues.* The value of the DTV capacity used for feeable ancillary or supplementary services may be estimated through the net revenues from

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<sup>21</sup> If the ancillary or supplementary service is sold in markets where competition is not fully developed, then output price will tend to be variable rather than fixed and should be replaced by marginal revenue in constructing the value of marginal product curve.

<sup>22</sup> A formal economic model that applies the notion of diminishing marginal productivity in estimating the implicit value of spectrum is provided in the early paper of James H. Alleman, "The Shadow Price of Electromagnetic Spectrum: A Theoretical Analysis," Office of Telecommunications, Paper #COM-75-10777, U.S. Department of Commerce, July, 1974.



each such service provided. Net revenue is defined as revenue from a service less incremental costs and a portion of joint and common costs. We believe that this revenue proxy for the auction value is one means of satisfying the criteria of the 1996 Act. A fee could be computed as a percentage of net revenues derived from each feeable ancillary or supplementary service. Such fee has the additional effect of allowing broadcasters to build their feeable ancillary or supplementary services to the break-even point without the assessment of a fee, fostering the development of these new services. Ascertaining the costs involved in calculation of net revenues may, however, be problematic. Such a determination would necessitate the apportionment of common expenses between and among free television services offered on a licensee's DTV capacity and each feeable ancillary or supplementary use of its DTV capacity. We have concerns as to whether this information will be readily and reliably available. We seek comment on the burden such a fee program would impose on broadcasters and on Commission staff in the audit and review process.

22. *Fee Based Upon Incremental Profits From Specific Services.* An alternative to such a cost accounting approach that would avoid the problem of the allocation of costs shared by multiple broadcasting and ancillary or supplementary services is assessing the fee on the difference between the incremental gross revenues for a given feeable ancillary or supplementary service and the incremental economic costs associated with the production of the service. The service-specific incremental cost would include the costs of all directly-attributable inputs of production, such as labor and equipment, and the economic depreciation and rate of return on any specific capital assets that are used exclusively in the production of a given feeable ancillary or supplementary service. Any costs, either variable or fixed, that are shared in the production of the advertiser-supported television service and an ancillary or supplementary service would be omitted in the calculation of profit. This approach has an advantage over the net revenue approach of reduced auditing requirements since joint and common costs do not have to be allocated.

23. Nevertheless, due to the accounting and enforcement difficulties, especially the potential need to conduct audits, we remain concerned about the feasibility of the incremental profits fee. We seek comment on the costs to broadcasters and the Commission of the specific proposal that DTV spectrum fees be based on the calculated profit for each feeable ancillary or supplementary service. In particular, what type of studies or recordkeeping will be required to estimate service-specific incremental cost? Will the Commission need to prescribe specific cost accounting rules to insure consistent and uniform calculations of incremental cost for purposes of calculating service-specific profit? Will the costs to broadcasters and the Commission of calculating and auditing the computation of service-specific profit exceed the benefit of avoiding whatever inefficiency in consumption may be induced by a fee based on gross revenues?

24. *Fee Based Upon Gross Revenues.* A fee assessed as a percentage of a licensee's gross revenues from the provision of feeable ancillary or supplementary services would be consistent with the 1996 Act and would avoid some of the infirmities of the fee based upon net revenues described above.<sup>23</sup> Moreover, we believe a fee based upon a

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<sup>23</sup> A predecessor to the 1996 Act, S. 1822, 103rd Cong., 2d Sess. (1994) contained language similar to that adopted in the 1996 Act regarding the assessment of fees for the ancillary or supplementary use of the DTV spectrum: "To the extent that the broadcast licensee provides commercial services using broadcast spectrum, the Commission shall be authorized to collect from each licensee an amount equivalent to the amount that would have

percentage of gross revenues could foster our goal of creating a fee structure which does not dissuade broadcasters from offering feeable ancillary and supplementary services. Such a fee would be straightforward to assess and calculate; the licensee would be required to report its gross revenues from feeable ancillary or supplementary services and to calculate a fee based upon a percentage of these revenues.<sup>24</sup> In addition, a fee set at a percentage of gross revenues provides broadcasters a more certain fee amount to use in their long term planning and decisions.

25. *Hybrid Fees.* Another possible fee structure is a two-part, tariff-like fee, in which the fee is comprised of a combination of a flat dollar amount and a percentage of gross revenues. Compared to a fee based purely on a percentage of gross revenues, a hybrid fee would include an element -- the flat fee -- that would provide a uniform means of preventing unjust enrichment and recover a portion of the value of the spectrum consistent with the statute. Moreover, a flat fee component would permit us to set the percentage rate of gross revenues at a lower level, thus avoiding a fee program that dissuades broadcasters from offering feeable ancillary and supplementary services. A flat amount, however, would be an up-front cost, which could serve as a disincentive to broadcasters to provide ancillary or supplementary services. Given the statutory requirement that we impose a fee on feeable ancillary and supplementary uses, a flat fee may be appropriate even if it does discourage some such uses. The addition of a percentage of gross revenues to the flat rate could prevent the unjust enrichment that might result from a flat fee, by recovering some percentage of gross revenues in excess of the up-front payment. We invite comment on the two-part fee proposal. We are especially interested in comments that recommend what the initial flat rate should be and explain the basis of the recommendation. Would the initial flat rate discourage broadcasters' institution of feeable ancillary or supplementary services or serve as an incentive to broadcasters to further develop feeable ancillary or supplementary services once established?

26. *Percentage Rate of Fee.* If the fee is assessed as a percentage of revenues or incremental profits, the percentage rate of the fee, more than the process by which it is

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been paid if the license to provide such service has been subjected to competitive bidding under section 309(j) of the Communications Act of 1934 (47 U.S.C. 309(j))." The legislative history of that Senate bill contemplates that the auction amount might be difficult to replicate and that revenues may be a more practicable basis of the fee. In particular, the Senate Report states that "[l]icensees will use only a portion of their assigned spectrum to provide ancillary and supplementary services, and for only limited times of the day, in contrast to providers of competing services that obtained license through competitive bidding under Section 309(j) of the 1934 Act. Nothing in subsection (b) is intended to preclude the FCC, in its determination of fees, from considering the annual revenues received by a television licensee for the provision of ancillary and supplementary services which are subject to fees. Nothing in this subsection (b) is intended to preclude the FCC from calculating a television licensee's annual fees on the basis of an appropriate percentage of such revenues." Sen. Rep. 367, 103rd Cong., 2d Sess. (1994).

<sup>24</sup> See *Report and Order*, In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1995, FCC 95-227, MD Docket No. 95-3, 10 FCC Rcd. 13512 at ¶ 134 (1995). ("[W]e have decided to adopt a gross revenues methodology for assessing [fees].... Properly administered, a gross revenues methodology will ease administrative burdens of carriers in calculating fee payments, provide reliable and verifiable information upon which to calculate the fee and equitably distribute the fee requirement in a competitively neutral manner. A revenue based methodology avoids the calculation problems inherent in [other methodologies] and permits the assessment of fees without any need to rely upon assumptions and projections.")

derived will determine the degree to which the fee affects broadcasters' decisions. We recognize that the 1996 Act exempts free broadcasting services from any such fees, thus to some extent creating an incentive for DTV licensees to use this capacity for free broadcasting services in addition to the one FCC-mandated free television service.<sup>25</sup> This is consistent with the Commission's previous statement that "the fundamental use of the 6 MHz DTV license will be for the provision of free over-the-air television service"<sup>26</sup> The greater the fee, the greater the incentive created by the fee for a broadcaster to use its assigned spectrum to provide free, over-the-air broadcast programming instead of subscription programming or other feeable ancillary or supplementary services. The lower the fee, the more flexible the broadcaster may be in serving audience demand for services and in choosing the mix of services it provides. We seek comment as to the types of services broadcasters may provide using DTV capacity. We are particularly interested in DTV licensees' plans for the provision of feeable ancillary or supplementary services. To the extent that commenters can estimate revenues at this time, we seek information as to the revenues anticipated from the use of the DTV capacity for feeable ancillary or supplementary services.

27. The percentage rate of the fee must reflect the statutory requirements that the fee recover a portion of the value of the spectrum used for these services, avoid unjust enrichment, and approximate the revenue that would have been achieved had these services been licensed through an auction. We ask commenters to take the statutory requirements and policy goals into account in proposing particular percentage rates. We also seek comment on how we should factor in our goal of permitting broadcasters flexibility to provide feeable ancillary or supplementary services in establishing an appropriate percentage rate for the fee. We are reluctant to set the percentage rate so high that it would dissuade broadcasters from providing feeable ancillary or supplementary services. We ask commenters to explain how the percentages they propose implicate this consideration. We seek comment on what percentage would be appropriate for the fee, taking into account the various proposals for assessing a fee. Clearly, a fee that is based upon gross revenues will be set at a lower percentage rate than a fee based upon net revenues or incremental profits. Similarly, the percentage rate of a fee incorporated into a hybrid approach will be lower than the percentage rate of a fee that is not additional to an up-front payment. We encourage commenters to make specific recommendations as to the level of the fee and type of fee assessment program to which the fee is to be tied and to provide evidence to build a record supporting those recommendations. For example, should we set the fee at one percent or less of gross revenues generated from feeable ancillary and supplementary services, or up to a more substantial ten percent of gross revenues?

28. An additional consideration is whether different feeable ancillary or supplementary services should be subject to fees set at different percentage rates. A varying percentage rate could have a number of disparate effects. Different rates for different services might create incentives for broadcasters to offer services with lower fees over services with higher fees and could affect broadcasters' choice from among alternative feeable ancillary or supplementary uses. On the other hand, a varying percentage rate fee could be used to adjust

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<sup>25</sup> In particular, where the costs and revenues of an additional free television service and an ancillary or supplementary service are identical, a spectrum fee on a subscription service but *not* on the free service might weight the broadcaster's choice in favor of offering a free service.

<sup>26</sup> *Fifth Report and Order* at ¶ 28.

the costs to broadcasters of providing feeable ancillary or supplementary services to reflect the different costs to competitors offering analogous services on spectrum purchased at auction or on spectrum not obtained at auction or through technologies that are not spectrum-based. Another consideration is whether the percentage rate of the fee should vary based upon the time of day during which the service is being provided or other factors. We seek comment on the imposition of a varying percentage rate fee.

29. The statute provides for the periodic adjustment of the fee, requiring that the fee "be adjusted by the Commission from time to time in order to continue to comply" with the 1996 Act.<sup>27</sup> While this provision generally gives us the authority to recalculate the fee once DTV is established and feeable ancillary or supplementary services are being offered, it also raises the possibility that we set a lower percentage rate for the fee at the outset. The assessment of a lower initial percentage rate would allow broadcasters a greater percentage of gross revenues during the build-out of DTV service and would also provide the Commission the opportunity to adjust the percentage rate after gaining more information concerning the nature of the services offered by licensees. The periodic adjustment of the fee allows the Commission to ensure that the fee program continues to meet the requirements of the statute, including the prevention of unjust enrichment and the recovery of a portion of the value of the spectrum. For example, the fee program could be adjusted where it is shown that it has given DTV licensees an unfair advantage in the provision of their feeable ancillary or supplementary services as compared with their nonbroadcast competitors providing analogous services on spectrum licensed through a competitive bidding process.

30. *Noncommercial Television Licensees.* In their Petition for Reconsideration of the *Fifth Report and Order*, the Association of America's Public Television Stations and the Public Broadcasting Service ("APTS/PBS") requested that the Commission exempt public television licensees from any obligation to pay fees when they offer feeable ancillary or supplementary services on their DTV capacity as a source of funding for their public television operation.<sup>28</sup> APTS/PBS argue that the revenues from the remunerative provision of feeable ancillary or supplementary services on their DTV capacity may provide a revenue stream to support their noncommercial broadcasting activities.

31. To the extent public television licensees ultimately offer feeable ancillary and supplementary services, we must determine whether and in what circumstances they are subject to fees for these services. We seek comment on the argument that noncommercial television licensees should be exempt from fees or subject to lower fees. Is such relief consistent with the 1996 Act's requirement that we collect a fee where the DTV spectrum is used for feeable ancillary or supplementary services for which a subscription fee is charged or compensation is received other than advertising revenues? If so, what form should such an exemption take? Should noncommercial DTV licensees be exempt from the fee where they offer revenue producing feeable ancillary or supplementary services as a source of funding for public television? If noncommercial licensees are subject to a fee for the feeable ancillary or supplementary use of the DTV capacity, should the fee be assessed at the same percentage as the fee for commercial licensees or at a lower rate? If noncommercial

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<sup>27</sup> 47 U.S.C. § 336(e)(2)(c).

<sup>28</sup> Petition for Reconsideration and Clarification of Association of America's Public Television Stations and Public Broadcasting Service in MM Docket No. 87-268 filed June 13, 1997, p. 28, n. 29.

broadcasters are exempt from the fee, or assessed a reduced fee what effect would this have on competing providers of these services? We ask commenters to address these questions.

### **Implementation**

32. The Commission proposes to employ similar procedures to those it currently uses for the administration of its filing fees, regulatory fees, and auction revenue programs.<sup>29</sup> Further, we propose to generally follow the same reporting and filing requirements as currently exist for other programs. We seek comment on the proposed means of implementing and collecting the fee. We seek comment on any special circumstances that merit an exception to our current processes.

33. If we assess a fee based in some way upon revenues, what source will reliably provide an accurate statement of the appropriate revenues? How can or should such figures be independently verified? What reporting and filing requirements will be required of broadcasters in connection with such collection?

34. The statute does not impose specific requirements on the collection of the fee, requiring only "an annual fee or other schedule or method of payment."<sup>30</sup> How does the collection of the fee affect its neutrality? Does a one time fee create a greater disincentive to offer feeable ancillary or supplementary services than a fee paid in installments? Should a revenue-based fee be assessed annually? Should a certain fee liability level entitle the licensee to pay in installments? Is there another payment schedule that might be more effective? Should a fee be paid upon license renewal?

## **IV. CONCLUSION**

35. The 1996 Act required the Commission to assess fees on the provision of feeable ancillary or supplementary services over the DTV spectrum. We issue this *Notice of Proposed Rule Making* to seek comment on the fee assessment programs proposed herein.

## **V. ADMINISTRATIVE MATTERS**

36. *Comments and Reply Comments.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before March 3, 1998 and reply comments on or before April 2, 1998. To file formally in this proceeding, you must file an original plus six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus eleven copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business

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<sup>29</sup> See 47 U.S.C. §§ 158, 159. See also 47 CFR 1.1101 *et seq.*, and 1.1151 *et seq.*

<sup>30</sup> *Id.* at § 336(e)(1)(B).

hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

37. *Initial Paperwork Reduction Act of 1995.* This *Notice* proposes a new fee assessment program which may contain an information collection requirement. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget ("OMB") to take this opportunity to comment on the information collection contained in this *Notice*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Notice*; OMB comments are due 60 days from the date of publication of this *Notice* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov) and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to [fain\\_t@al.eop.gov](mailto:fain_t@al.eop.gov).

38. *Ex parte Rules.* This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the rules. 47 C.F.R. § 1.1206(b), as revised. *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. See 47 C.F.R. § 1.1206(b)(2), as revised. Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

39. *Initial Regulatory Flexibility Analysis.* With respect to this *Notice*, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in Appendix A. As required by the Regulatory Flexibility Act<sup>31</sup>, the Commission has prepared an IRFA of the expected significant economic impact on small entities by the policies and rules proposed in this *Notice*. Written public comments are requested on the IRFA. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a number of questions in our IRFA regarding the prevalence of small businesses in the industries covered by this *Notice*. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the *Notice*, but they must have a distinct heading designating them as responses to the IRFA.

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<sup>31</sup> Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981), as amended.

40. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i), 303, 336 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, 336 and 403, this *Notice of Proposed Rule Making* IS ADOPTED.

41. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Notice*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

42. *Additional Information.* For additional information on this proceeding, please contact Jerry Duvall, Chief Economist, Mass Media Bureau (202) 418-2600 or Susanna Zwerling, Policy and Rules Division, Mass Media Bureau (202) 418-2140 or Jonathan Levy, Office of Plans and Policy (202) 418-2030.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary

## APPENDIX A

**Initial Regulatory Flexibility Analysis**

As required by the Regulatory Flexibility Act (RFA),<sup>32</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in this *Notice*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice* provided above in paragraph 36. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>33</sup> In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.<sup>34</sup>

**Reasons Why Agency Action is Being Considered:** The 1996 Act directed the Commission to adopt regulations allowing licensees to use a portion of the DTV spectrum to provide feeable ancillary or supplementary services and to establish a program to assess and collect a fee for these services. In the *Fifth Report and Order* we established rules permitting broadcasters to offer feeable ancillary or supplementary services on the DTV spectrum. As directed by Congress, in this proceeding we propose a means of assessing and collecting a fee for the feeable ancillary or supplementary use of the DTV spectrum.

**Need For and Objectives of the Proposed Rule Changes:** The 1996 Act specified that the Commission shall establish a program to assess and collect fees for the feeable ancillary or supplementary use of the DTV capacity. Congress set forth the following objectives to be achieved by the assessment of the fee: first, that the fee recover a portion of the value of the DTV capacity; second, that the fee prevent the unjust enrichment of broadcast licensees using the DTV capacity to provide services for which they receive revenues other than advertising revenues; third, that the fee recover "for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered" in an auction of the spectrum; and finally, that any free broadcasting service which relies upon commercial advertisements rather than subscription fees or other compensation for its revenues be exempt from the fee requirement. In the *Fifth Report and Order* we expressed our objective that broadcasters develop innovative uses of the DTV spectrum and be free to respond to market demand for feeable ancillary or supplementary services provided over this spectrum. This proceeding should achieve the objectives set forth in the 1996 Act and in the *Fifth Report and Order*.

**Legal Basis:** Authority for the actions proposed in this *Notice* may be found in Sections 4(i), 303(r), 336 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 336 and 403.

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<sup>32</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>33</sup> See 5 U.S.C. § 603(a).

<sup>34</sup> *Id.*



**Recording, Recordkeeping, and Other Compliance Requirements:** The *Notice* proposes a new fee assessment program which may contain an information collection requirement. In general, the proposed fee assessment programs which would assess a fee for feeable ancillary or supplementary services based upon revenues derived from these services would require broadcasters to report their revenues derived from these services. Certain alternative fee assessment proposals may require more information from broadcasters than would other proposals. In the *Notice*, the Commission has proposed a fee assessment program that seeks to minimize the administrative and reporting burdens on broadcast licensees.

**Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply:** Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions.<sup>35</sup> The RFA<sup>36</sup> generally defines the term "small organization" to mean "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." In addition, the RFA,<sup>37</sup> generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA"). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."<sup>38</sup>

The proposed rules and policies will apply to television broadcasting licensees. The Small Business Administration defines a television broadcasting station that has no more than \$10.5 million in annual receipts as a small business.<sup>39</sup> Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.<sup>40</sup> Included in this industry are

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<sup>35</sup> 5 U.S.C. § 601(6).

<sup>36</sup> 5 U.S.C. § 601(4).

<sup>37</sup> *Id.* at § 601(3)

<sup>38</sup> While we tentatively believe that the SBA's definition of "small business" greatly overstates the number of television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the proposals on small television stations, for purposes of this *Notice*, we utilize the SBA's definition in determining the number of small businesses to which the proposed rules would apply, but we reserve the right to adopt a more suitable definition of "small business" as applied to television broadcast stations or other entities subject to the proposed rules in this *Notice* and to consider further the issue of the number of small entities that are television broadcasters or other small media entities in the future. See *Report and Order* in MM Docket No. 93-48 (*Children's Television Programming*), 11 FCC Rcd 10660, 10737-38 (1996), citing 5 U.S.C. § 601(3).

<sup>39</sup> 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4833 (1996).

<sup>40</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 CENSUS OF TRANSPORTATION, COMMUNICATIONS AND UTILITIES, ESTABLISHMENT AND FIRM SIZE, Series UC92-S-1, Appendix A-9 (1995).

commercial, religious, educational, and other television stations.<sup>41</sup> Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.<sup>42</sup> There were 1,509 television stations operating in the nation in 1992.<sup>43</sup> That number has remained fairly constant as indicated by the approximately 1,563 operating television broadcasting stations in the nation as of October 31, 1997.<sup>44</sup> For 1992<sup>45</sup> the number of television stations that produced less than \$10.0 million in revenue was 1,155 establishments.<sup>46</sup>

Thus, the proposed rules will affect many of the approximately 1,563 television stations; approximately 1,200 of those stations are considered small businesses.<sup>47</sup> These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television or non-radio affiliated companies.

In addition to owners of operating television stations, any entity who seeks or desires to obtain a television broadcast license may be affected by the proposals contained in this item. The number of entities that may seek to obtain a television broadcast license is unknown.

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<sup>41</sup> *Id.* See Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations (SIC Code 4833) as:

Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

<sup>42</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 CENSUS OF TRANSPORTATION, COMMUNICATIONS AND UTILITIES, ESTABLISHMENT AND FIRM SIZE, Series UC92-S-1, Appendix A-9 (1995). Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number. SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 (Theatrical Producers and Miscellaneous Theatrical Services (producers of live radio and television programs).

<sup>43</sup> FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 78, Appendix A-9.

<sup>44</sup> FCC News Release "Broadcast Station Totals as of October 31, 1997," issued November 26, 1997.

<sup>45</sup> Census for Communications' establishments are performed every five years ending with a "2" or "7". See Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 78, III.

<sup>46</sup> The amount of \$10 million was used to estimate the number of small business establishments because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

<sup>47</sup> We use the 77 percent figure of TV stations operating at less than \$10 million for 1992 and apply it to the 1997 total of 1563 TV stations to arrive at 1,200 stations categorized as small businesses.

We seek comment on these estimates and data regarding the number of small entities affected by the proposals in this *Notice*.

**Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules:** The initiatives and proposed rules raised in this proceeding do not overlap, duplicate or conflict with any other rules.

**Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives:** This *Notice* solicits comment on a variety of alternatives discussed herein. Any significant alternatives presented in the comments will be considered. The proposed rules and policies are required to implement provisions of the 1996 Act. These proposed rules and policies may affect broadcast television licensees, some of which are small businesses. The Commission believes that the proposed rules and policies may be necessary to the recovery of a portion of the value of the public spectrum and to promote the development of innovative uses of the DTV capacity. We seek comment on the alternatives proposed in the *Notice* and on whether there is a significant economic impact on any class of small licensee or permittee as a result of any of our proposed approaches.

**Separate Statement  
of  
Commissioner Ness**

*RE: Digital Television Fees NPRM*

Last year at this time, the Commission adopted the transmission standard for digital television (DTV). In keeping with our "Christmas present" approach to digital television, we today adopt a Notice of Proposed Rulemaking to implement Section 336(e) of the Telecommunications Act of 1996 ("the Act"). This section directs the Commission to establish a program to assess and collect fees from television broadcasters to compensate the American public for offering certain "ancillary and supplementary services" using digital television channel capacity.

As television broadcasters design their business plans for conversion from analog to digital, they need to know how fees will be assessed if they choose to devote the unused portion of digital capacity to pay services or to derive revenues from other-than-advertising-supported free broadcasting. The amount of such fees will have a bearing on how they use their DTV channel.

By statute -- and by our service rules -- television broadcasters are permitted to use a portion of the digital capacity for other services -- including pay services so long as these uses are consistent with the Commission's DTV transmission standard and do not derogate the primary broadcast signal. The digital standard accommodates a wide variety of uses -- e.g. delivery of data, additional video program streams, updating computer programs. Computer and television convergence is as close as our remote controls.

Even while broadcasting in high definition, a licensee will have additional capacity within the digital bitstream to provide other uses. The digital information needed to convey a video picture constantly varies from scene to scene -- fewer bits are necessary for a shot of two people talking with a static background, compared to a broadcast of a Wizards basketball game. In the overnight hours, there undoubtedly will be additional capacity available to provide viewers with a cornucopia of new services.

Congress has also made it clear that broadcasters who wish to use a portion of the digital capacity for other revenue-enhancing services must compensate the American public for such use of that portion of the spectrum. The spectrum allocation for DTV extends the public trust that was established with broadcast licensees 70 years ago and ensures that a free, over-the-air television service will be available to *all* Americans in the 21st century.

There are many methods for assessing such fees and our Notice today is designed to spur comment on these. Whichever method we ultimately adopt must be **simple to apply and simple to enforce**. Broadcasters should not need to hire a battery of economists to comply with their obligations.

As a final note, Congress has made it abundantly clear that it fully expects broadcasters to focus their digital capacity on providing their local communities with a wealth of free broadcast programming, including programming transmitted in high definition. While the opportunity to provide many new and exciting services is available through the flexibility of the digital standard, I do not anticipate broadcasters will abandon their birthright of top quality free video broadcasting.

I look forward to next Christmas season, when digital television service will be inaugurated by many committed and enthusiastic broadcasters, beginning in the top markets across this country.